

No. 19-185

**In The
Supreme Court of the United States**

KALEV MUTOND, ET AL.,

Petitioners,

v.

DARRYL LEWIS

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit*

BRIEF IN OPPOSITION

Pratik A. Shah
Counsel of Record
Donald R. Pongrace
Z.W. Julius Chen
Merrill C. Godfrey
Lide E. Paterno
AKIN GUMP STRAUSS
HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20006
(202) 887-4000
pshah@akingump.com

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Petitioners failed to demonstrate entitlement to foreign-official conduct-based immunity under the Restatement (Second) of Foreign Relations Law where a judgment that Petitioners engaged in torture in violation of the Torture Victim Protection Act of 1991 (TVPA) would not have the effect of enforcing a rule of law against the Democratic Republic of the Congo.

II. Whether the TVPA “displaces” common-law conduct-based immunity in a case where (as here) the U.S. State Department declines to file a suggestion of immunity.

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INTRODUCTION

In 2016, Respondent Darryl Lewis was incarcerated for six weeks in the Democratic Republic of the Congo (DRC) at the hands of the Congolese secret police. He was interrogated for 16 hours a day, assaulted, starved, and deprived of sleep—despite the fact that torture is a crime and unconstitutional under DRC law. Lewis brought suit under the Torture Victim Protection Act of 1991 (TVPA) against Petitioners, two Congolese officials, for their roles in his abuse.

Because the U.S. Department of State declined (on more than one occasion) the Congolese government's requests for a suggestion of immunity, the question before the courts below was whether Petitioners are entitled to foreign-official conduct-based immunity for the alleged acts. The D.C. Circuit assumed—but did not decide—that the Restatement (Second) of Foreign Relations Law defines the contours of that immunity. Ultimately, the court of appeals issued three separate opinions adopting two independent grounds for rejecting the immunity defense based on the record before it.

Although Petitioners claim that both of the D.C. Circuit's immunity-defeating holdings create circuit splits, neither actually does. In its primary holding, the D.C. Circuit engages in the usual fact-intensive analysis courts undertake when determining whether “exercising jurisdiction in the case is tantamount to enforcing a rule of law against the [state] itself.” While the decision might be the first to highlight the individual-versus-official capacity distinction when

conducting that multi-faceted analysis, it does not announce a categorical rule and, regardless, no court of appeals has rejected its approach. In its alternative holding, the D.C. Circuit concludes that, because a central element for liability under the TVPA overlaps with a necessary element for immunity under Restatement § 66(f), the latter must give way to the former. That is *not* tantamount to holding that the TVPA “abrogates” foreign-official immunity *writ large*—Petitioners’ characterization to track the lone (and readily distinguishable) post-*Samantar* case they claim poses a conflict.

The D.C. Circuit’s rulings on both scores comport with this Court’s decisions and the views of the Executive Branch. In any event, this case offers an exceptionally poor vehicle for further review. The Court would confront threshold questions that were never argued nor briefed below (and that have not been tested in any other adversary proceeding). And the fact that the State Department exercised its discretion not to intervene here to cut off this suit—a tool that remains at its disposal in any future TVPA case—undermines Petitioners’ hyperbole about possible foreign-policy consequences.

The petition should be denied.

STATEMENT

A. Legal Framework

1. “For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country.” *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). But this Court “made clear”

in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), that the common-law doctrine of “foreign sovereign immunity is a matter of grace and comity on the part of the United States.” *Verlinden*, 461 U.S. at 486. “Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state’s claim of sovereign immunity.” *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). First, if the Executive Branch filed a “suggestion of immunity,” then “the district court surrendered its jurisdiction.” *Id.* If the Executive Branch withheld a suggestion of immunity, however, then “a district court had authority to decide for itself whether all the requisites for such immunity existed.” *Id.* (internal quotation marks omitted).

Since 1976, the Foreign Sovereign Immunities Act (FSIA) has “govern[ed] the determination of whether a foreign *state* is entitled to sovereign immunity.” *Samantar*, 560 U.S. at 313 (emphasis added). But as this Court clarified in *Samantar*, a foreign *official’s* claim of immunity continues to be governed by the pre-existing two-step procedure. *Id.*

“[C]ustomary international law has long distinguished between status-based immunity afforded to sitting heads-of-state and conduct-based immunity available to other foreign officials.” *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012), *cert. denied*, 571 U.S. 1156 (2014). At least under the Restatement (Second) of Foreign Relations Law, conduct-based immunity—the only immunity at issue here—is afforded to: (1) “any public minister, official, or agent of the state”; (2) “with respect to acts performed in his official capacity”; if (3) “the effect of exercising jurisdiction would be to enforce a rule of law

against the state.” Restatement (Second) of Foreign Relations Law § 66(f) (1965) (“Restatement”). The foreign official must establish all three requirements. *Id.*

2. The TVPA “establish[es] a civil action for recovery of damages from an individual who engages in torture.” Pub. L. No. 102-256, 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350). Liability extends to individuals who act “under actual or apparent authority, or color of law, of any foreign nation.” *Id.* § 2, 106 Stat. at 73.

B. Factual Background

1. Respondent Darryl Lewis is an American citizen and veteran. Pet. App. 17a. In 2016, he worked in the DRC as an “unarmed security advisor” to former provincial governor and DRC presidential candidate Moise Katumbi. *Id.* at 2a.

In April 2016, Lewis and his colleagues were leaving a political rally when Congolese riot police stopped and surrounded their cars, “solely because of their association with Mr. Katumbi.” Pet. App. 17a, 32a. Members of the Congolese secret police—the Agence Nationale de Renseignements (ANR), headed by Petitioner Kalev Mutond as General Administrator—arrived soon after and dragged Lewis and others to the ground and beat them. *Id.* at 3a, 17a, 32a. After transporting Lewis and his colleagues “to a local jail, *** ANR members continued to assault them during a lengthy interrogation.” *Id.* at 3a. The next morning, Lewis and his colleagues, some of whom were brutally beaten during the night, were transferred to the ANR’s headquarters. *Id.* at 33a.

Over the next six weeks, the ANR sought to elicit from Lewis “a false confession that he was an American mercenary.” Pet. App. 17a. To that end, members of the ANR interrogated Lewis for about 16 hours a day, abusing him both physically and mentally. *Id.* at 3a. They regularly assaulted him, pulling his handcuffed hands behind his back to put acute pressure on his shoulder joints. *Id.* at 32a. They timed the interrogations to disrupt his sleep. *Id.* at 3a, 33a. They “intentionally starved” him, *id.* at 3a, providing only tiny meals at irregular and unpredictable hours, *id.* at 33a. And they withheld “the necessities for basic hygiene.” *Id.* at 17a.

Lewis also received threats directly from Kalev. Roughly 10 days into his incarceration, Kalev warned: “Don’t let me find out you’re a mercenary.” Pet. App. 34a. Lewis understood that statement to mean that he “would suffer greatly once a false concession was extracted, and that he would be sent to prison indefinitely.” *Id.*

2. During Lewis’s incarceration and torture, Petitioner Alexis Thambwe Mwamba—the DRC Minister of Justice and a political rival of Katumbi—made numerous public announcements that Katumbi was using American mercenaries “to destabilize the DRC.” Pet. App. 17a-18a. He pointed to Lewis as evidence, claiming that Lewis was a mercenary sent to assassinate the president. *Id.* at 17a, 34a. For that reason, Petitioners “enabled the abuses described,” “[r]ather than order [Lewis’s] release from custody and protect him from torture.” *Id.* at 4a.

After extensive diplomatic efforts and negotiations—including a U.S. Embassy statement

“condemning [Thambwe’s] remarks concerning Lewis and mercenary activities,” Pet. App. 3a—Lewis was finally released in June 2016. *Id.* at 36a. Neither Thambwe “[n]or any other DRC official” charged Lewis with any crime. *Id.* at 18a.

C. Procedural History

1. In July 2016, Lewis brought a TVPA suit against Thambwe and Kalev, in their individual capacities only. Pet. App. 28a-29a. Petitioners moved for dismissal for lack of subject matter jurisdiction, arguing that foreign-official immunity barred the suit. *Id.* at 16a.

The district court held that, under Restatement § 66, “all the requisites for *** [conduct-based] immunity exist[]”: “(1) the [Petitioners] are agents of the DRC; (2) any actions [Petitioners] took in relation to [Lewis’s] detention were carried out in their official capacities; and (3) exercising jurisdiction would have the effect of enforcing a rule of law against the DRC.” Pet. App. 20a-21a (second alteration in original) (citing Restatement § 66). The court thus dismissed the case on immunity grounds. *Id.* at 25a.

Petitioners also sought dismissal for lack of personal jurisdiction. Pet. App. 16a. Although that issue was fully briefed, the district court did not reach it. *Id.* at 25a.

2. The court of appeals reversed and remanded for further proceedings. Although all three panel members agreed that Petitioners are not entitled to immunity, each authored a separate opinion in support of that result.

a. In the principal opinion, Judge Wilkins employed “the two-step procedure outlined in *Samantar* to evaluate [Petitioners’] claim to conduct-based immunity” under the common law. Pet. App. 5a. Judge Wilkins “conclude[d] that [Petitioners] are not entitled to immunity” at step one because the State Department declined to submit a “suggestion of immunity” to the district court—even though the DRC Ambassador twice made such a request to the Department. *Id.* Judge Wilkins then proceeded to analyze at step two “whether [Petitioners] satisfy the requisites for conduct-based immunity.” *Id.* at 6a.

Because “both parties [had] assume[d] § 66 [of the Restatement] accurately sets out the scope of common-law immunity for current or former officials” at step two, Judge Wilkins “proceed[ed] on that understanding without deciding the issue.” Pet. App. 6a. In particular, Judge Wilkins examined the allegations in the complaint to determine whether, under the third prong of § 66(f), “exercising jurisdiction” in this case “is tantamount to enforcing a rule of law against the DRC itself.” *Id.* Judge Wilkins found “the remedies sought” to be an important indicator: If a remedy “would bind (or be enforceable against) the foreign state,” then exercising jurisdiction over the claim may “serve to enforce a rule of law against” that state, entitling the official to immunity. *Id.* at 7a.

In Judge Wilkins’s view, the remedy sought here, combined with other facts in the record, weighed against such a finding. Pet. App. 7a-8a. Notably, Lewis had sued Petitioners in their “individual capacities” and Petitioners did not “proffer[] anything

to show that [he] seeks to draw on the DRC’s treasury or force the state to take specific action.” *Id.* at 7a. In addition, the “collateral effects” Petitioners raised—such as “[t]aking [them] away from their official duties” to defend this case—were “too attenuated.” *Id.* at 8a. Judge Wilkins thus determined that Petitioners did not satisfy the Restatement’s “necessary third element.” *Id.*

Without addressing the other two elements, Judge Wilkins vacated the judgment of dismissal and remanded for the district court to “consider the question of personal jurisdiction.” Pet. App. 8a-9a.

b. Concurring in the judgment, Judge Randolph wrote separately to question whether foreign-official immunity “turns on ‘the common law,’” and if it does, whether the Restatement “embodies th[at] governing common law.” Pet. App. 11a. Judge Randolph found “both assumptions”—“[n]either [of which] ha[d] been tested in an adversary proceeding”—to be “dubious.” *Id.*

Judge Randolph observed that the Restatement “does not pretend to be a statement of ‘common law,’” and that Restatement § 66(f)’s immunity provision

appears to be a distillation of scant case law in this country, international treaties to which the United States may or may not be a party, the writings of law professors here and abroad, negotiated settlements of international disputes, and other non-judicial sources such as actions of our Department of State and perhaps comments in meetings of the American Law Institute.

Pet. App. 12a.

Assuming “there were a common law of immunity for foreign officials” and that “the Restatement (Second) § 66(f) stated it,” Judge Randolph noted a conflict between § 66(f) and § 2(a) of the TVPA. Pet. App. 13a. By targeting individuals who torture others “under actual or apparent authority, or color of law, of any foreign nation,” the TVPA “imposes liability for actions that would render the foreign official eligible for immunity under the Restatement.” *Id.* at 13a-14a. Given “such a clear conflict between statutory law and judge-made common law,” Judge Randolph suggested that “the common law must give way” to the TVPA at *Samantar’s* second step. *Id.* at 14a.

In closing, Judge Randolph reiterated that “[t]he conflict between the Torture Act’s basis for liability and the Restatement’s basis for immunity from liability was neither briefed nor argued.” Pet. App. 15a. In the end, he “agree[d] with the court that if the Restatement did apply, [Petitioners] were not immune.” *Id.*

c. Judge Srinivasan “fully join[ed] Judge Wilkins’s opinion, which explains that if, as the parties assume, Restatement (Second) of Foreign Relations Law § 66(f) sets out the scope of common-law, conduct-based immunity for foreign officials, the defendants in this case do not qualify for that immunity.” Pet. App. 10a. Judge Srinivasan “also agree[d] with the portion of Judge Randolph’s concurrence in the judgment” that explains how the TVPA “subjects foreign officials to liability for acts undertaken in an official capacity and thus displaces any common-law, conduct-based

immunity that might otherwise apply in the context of claims under that Act.” *Id.*

Accordingly, in Judge Srinivasan’s view, Petitioners “in this case do not qualify for immunity for either of two reasons.” Pet. App. 10a. “[A]s Judge Wilkins explains, they fall outside the scope of the common-law, conduct-based immunity contemplated by Restatement § 66(f).” *Id.* Alternatively, “as Judge Randolph explains, they fall within the scope of liability contemplated by the TVPA per the allegations in the complaint.” *Id.*

REASONS FOR DENYING THE PETITION

The D.C. Circuit’s decision denies Petitioners’ claims of conduct-based immunity on two independent grounds. Neither gives rise to a conflict among the courts of appeals, and both are predicated on an assumption—never litigated here—that the Restatement governs the inquiry. And given that the State Department declined a suggestion of immunity in this case, Petitioners’ exaggerated claims of a potential diplomatic crisis fall flat. This Court should deny further review.

I. NEITHER QUESTION PRESENTED INVOLVES A CIRCUIT CONFLICT

A. No Other Court Of Appeals Has Considered—Let Alone Refuted—The Relevance Of An Individual-Capacity Limitation For Conduct-Based Immunity Under Restatement § 66(f)

According to Petitioners, there is “confusion” in the courts of appeals over whether conduct-based

immunity “appl[ies] where a plaintiff seeks money damages from foreign officials only in their personal capacities.” Pet. 11-12. That is incorrect. Although the D.C. Circuit might have been the first to emphasize the individual-versus-official capacity distinction in such terms, there is no conflicting court of appeals decision on that issue. None of the decisions cited by Petitioners address that distinction—and certainly not in terms of the third element of Restatement § 66(f). Pet. 10 (citing *Doğan v. Barak*, 932 F.3d 888 (9th Cir. 2019); *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009); *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971)).

Far from creating a legal rule that “foreign officials [a]re categorically barred from asserting immunity in personal-capacity suits,” Pet. 14, the decision below undertakes the sort of fact-dependent analysis courts regularly employ when determining whether “a defendant [has] establish[ed] all three factors” for conduct-based immunity under Restatement § 66(f). Pet. App. 6a. In particular, the D.C. Circuit focused on whether Petitioners “satisf[ied] the third [Restatement] factor by proving that exercising jurisdiction in this case is tantamount to enforcing a rule of law against the DRC itself.” *Id.* In analyzing that factor, the court of appeals considered the nature of the relief sought, including not just the formal distinction of individual-versus-official capacity but also the functional lack of any indemnity and the explicit disclaimer of relief against the DRC. *Id.* at 7a-8a. The court also took into account whether the “collateral effects” Petitioners raised were “too attenuated” to have a “direct fiscal

impact[] on the foreign state.” *Id.* at 8a. Based on its review of the record, the court concluded that Petitioners were “not entitled to the conduct-based foreign official immunity” because they “ha[d] not proffered anything to show” that “exercising jurisdiction would serve to enforce a rule of law against the foreign state.” *Id.* at 6a-8a.

That analysis is consistent with other decisions analyzing whether a foreign-official defendant’s claim to immunity satisfies Restatement § 66(f)’s third prong—including those that reach the opposite end result. *See, e.g., Rishikof v. Mortada*, 70 F. Supp. 3d 8, 15 (D.D.C. 2014) (“If, on the other hand, Plaintiff had not sued the Swiss Confederation for joint and several liability, but instead chose to proceed exclusively against Mortada, then Mortada would not be entitled to immunity.”).

Petitioners claim that *Doğan* places the (supposed) conflict “in stark relief” because the Ninth Circuit “rejected” the plaintiffs’ reliance on the fact that they “had sued [the defendant] in his personal capacity.” Pet. 11. But the Ninth Circuit did no such thing. Instead, the Ninth Circuit “conclude[d] that exercising jurisdiction over Barak *in th[at] case* would be to enforce a rule of law against the sovereign state of Israel”—“*based on the record before [it].*” 932 F.3d at 893-894 (emphasis added). It reached that context-specific result based predominantly on the State Department’s suggestion of immunity, which the court gave at least “considerable weight,” as well as allegations that the defendant “was ‘instructed by the Prime Minister to conduct’ the operations” and that he possessed authority to “plan, order, and control” the

operations at issue as “set out in Israel’s Basic Law.” *Id.* at 894. Each of those factors weighed in favor of finding that “the effect of exercising jurisdiction would be to enforce a rule of law against the state.” *Id.* at 893 (quoting Restatement § 66(f)). None was before the court of appeals here. *See* Pet. App. 37a (“Defendants’ acts in the torture of Mr. Lewis were *ultra vires* and not authorized by law, because torture is a crime and is unconstitutional in the DRC.”).

Indeed, the United States in *Doğan* explained that, “[b]ecause the State Department suggested Barak’s immunity,” the analysis in the D.C. Circuit’s decision below was “irrelevant.” U.S. Rule 28(j) Ltr. 1, No. 16-56704 (9th Cir. June 5, 2019), ECF No. 69. The defendant proffered the same distinction. *See* Barak Rule 28(j) Ltr. 1, No. 16-56704 (9th Cir. June 6, 2019), ECF No. 70 (“Because the State Department filed a[] [statement of immunity] here, Minister Barak would be immune under *Lewis*.”). Despite being apprised of the D.C. Circuit’s decision, the Ninth Circuit did not mention, much less disagree, with its primary holding.

The pre-*Samantar* Second Circuit cases do not grapple with the individual-capacity distinction either. In *Matar*, the analysis hinged entirely on *Samantar* step one because the court found the State Department’s suggestion of immunity to be dispositive. *See* 563 F.3d at 14 (“The United States—through the State Department and the Department of Justice—filed a Statement of Interest in the district court specifically recognizing Dichter’s entitlement to immunity and urging that appellants’ suit ‘be dismissed on immunity grounds.’ Accordingly, *** he is *** immune from suit under common-law

principles[.]”); *see also Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) (“[W]here the State Department has given a formal recommendation, however, the courts need not reach questions of [whether other prerequisites for immunity exist]. *** Hence, once the State Department has ruled in a matter of this nature, the judiciary will not interfere.”); Pet. 14. The Second Circuit never reached the Restatement § 66(f) factors or *Samantar* step two.

Heaney is even further afield. The Second Circuit’s discussion of foreign official immunity concerned “whether consular immunity exists”—*i.e.*, whether defendant was entitled to *status-based* immunity reserved for diplomats and heads of state. 445 F.2d at 505; *see id.* at 502 (“The defendants moved for dismissal of the complaint on the grounds, insofar as here relevant, that the court lacked jurisdiction by virtue of the sovereign immunity of the Spanish Government and the consular immunity of Gomero,” “inasmuch as Gomero was a consular official[.]”). That facet of foreign-official immunity is entirely distinct from conduct-based immunity governed by *Samantar*’s two-step procedure. *See* 560 U.S. at 312 n.6 (noting that, in addition to two-step procedure, “[d]iplomatic and consular officers could also claim the ‘specialized immunities’ accorded those officials”). And the Second Circuit’s decision to recognize the defendant’s immunity was based in part on the Executive Branch’s commitment to the protections afforded that status by the Vienna Convention on Consular Relations. 445 F.2d at 505-506 (“[I]t is *** not for the courts to deny an immunity which our

government has seen fit to allow” by signing the Vienna Convention, especially “since the State Department has ample means for dealing with consular officials whose activities it finds unacceptable[.]” (ellipsis in original).

In sum, Petitioners have offered no circuit authority precluding courts from considering, as part of the analysis under Restatement § 66(f), whether a defendant claiming immunity has been sued solely in an individual capacity and whether the relief sought ultimately would run against the foreign state. There is simply no circuit conflict on the D.C. Circuit’s primary holding.

B. The Circuits Are Not Divided Over The D.C. Circuit’s Alternative TVPA Holding

The D.C. Circuit’s alternative holding that common-law immunity gives way to the TVPA—which “was neither briefed nor argued,” Pet. App. 15a—does not arise unless Petitioners are found to be immune under the fact-dependent Restatement § 66(f) analysis. Because the D.C. Circuit’s contrary conclusion on that first question does not implicate a circuit conflict, the Court should stop there. But even taking the second question in isolation, no circuit conflict warrants this Court’s intervention. Tellingly, the subsequent Ninth Circuit decision that Petitioners claim poses a “direct[] conflict” (Pet. 12) did not so much as mention the D.C. Circuit’s alternative holding. That is because the cases are fundamentally different: unlike in *Doğan*, the State Department declined to issue a suggestion of immunity here. As a result, the D.C. Circuit, in contrast to the Ninth

Circuit, addressed *only* step two (not step one) of the *Samantar* analysis.

1. Contrary to Petitioners’ insistence, the D.C. Circuit never held that “the TVPA *abrogates all* common-law conduct-based immunity for foreign officials.” Pet. I (emphasis added). In fact, unlike in *Doğan*—which uses some variant of “abrogate” 16 times, 932 F.3d at 892-896—that term appears nowhere in the D.C. Circuit opinions. Instead, those opinions state only that, because Petitioners “fall within the scope of liability contemplated by the TVPA per the allegations in the complaint,” Pet. App. 10a, “the TVPA *displaces* conduct-based immunity *in this context*,” *id.* at 2a (emphases added).

The distinction between “abrogation” and “displacement” of the common law is one of substance, not semantics. The concept of “abrogation” is rooted in the principle that “[c]ommon-law doctrines ‘ought not to be deemed repealed, unless the language of a statute be *clear and explicit* for this purpose.’” Pet. 20 (emphasis added) (quoting *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983)). Consequently, the Ninth Circuit in *Doğan* trained its analysis on whether the statute contained an express intention to do away with immunity: “we hold that the TVPA does not abrogate foreign official immunity” because, “although the TVPA purports to impose liability on any ‘individual who, under actual or apparent authority, or color of law, of any foreign nation’ engages in torture or an extrajudicial killing, the statute itself does not expressly abrogate any common law immunities.” 932 F.3d at 894-896 (“[T]he TVPA is silent as to whether

any common law immunities are abrogated[.]”). Petitioners adopt the same tack here: “[T]he TVPA does not expressly abrogate any common law immunities”; it “should therefore be read in harmony with general [common-law] principles of conduct-based immunity.” Pet. 22 (second alteration in original) (internal quotation marks omitted).

In contrast, “the relevant question for purposes of displacement is whether the field has been occupied, not whether it has been occupied in a particular manner.” *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 426 (2011) (internal quotation marks omitted). Thus, it was enough for Judges Randolph and Srinivasan that the TVPA “imposes liability for actions that would render the foreign official eligible for immunity under the Restatement,” namely, engaging in torture “under actual or apparent authority, or color of law, of any foreign nation.” Pet. App. 13a-14a. Short of searching for (let alone announcing) a “clear and explicit” congressional purpose, Pet. 20—as the Ninth Circuit required—Judges Randolph and Srinivasan concluded that the “clear conflict between statutory law and judge-made common law” required that “the common law must give way,” Pet. App. 14a.

2. Beyond that doctrinal distinction, the consequences of abrogation (as used in *Doğan*) and displacement (as used in the decision below) differ. The Ninth Circuit examined whether to “constru[e] the TVPA to abrogate common law foreign official immunity” writ large, and determined that Congress had not “abolish[ed] wholesale all common-law immunities” previously extended to foreign officials.

Doğan, 932 F.3d at 895 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

The D.C. Circuit, by contrast, evaluated the narrower question of whether the TVPA displaces Restatement § 66(f) in determining a defendant’s entitlement to “common-law, conduct-based immunity that might otherwise apply in the context of claims under that Act.” Pet. App. 10a. The decision below did not address, let alone “abrogate,” conduct-based immunity “in its entirety” or “in essentially every case.” Pet. 2, 20.

Petitioners’ argument about suggestions of immunity makes concrete the distinction between abrogation and displacement. In Petitioners’ view, if “the TVPA abrogates common-law conduct-based immunity root and branch, *a fortiori* it abrogates the Executive Branch’s ability to suggest common-law immunity.” Pet. 15. That is because “[i]f Congress has abrogated immunity, then there is no immunity for the State Department to suggest.” *Id.*

Not so under the decision below. The D.C. Circuit’s “displacement” holding is directed at “*Samantar*’s second step,” which “requires *the district court* to ‘*decide for itself* whether all the requisites for such immunity exist[].” Pet. 14 (alteration in original) (emphasis added) (quoting *Samantar*, 560 U.S. at 311). That follows from the fact that the alternative holding is tethered to the application of Restatement § 66(f), Pet. App. 13a-14a, which comes into play only at “step two” of the procedure outlined in *Samantar*, *id.* at 6a. The TVPA’s displacement of Restatement § 66(f) there can have no bearing on the *first step*, which depends entirely on whether “the Executive

Branch issues a ‘suggestion of immunity.’” Pet. 14 (quoting *Samantar*, 560 U.S. at 311). The United States made precisely that argument in *Doğan*: “The State Department did not suggest the immunity of the foreign official in [the D.C. Circuit case], so that alternative holding [regarding TVPA displacement] is not controlling here.” U.S. Rule 28(j) Ltr. 1-2, No. 16-56704.

The same reasoning resolves any tension between the decision below and *Matar*. Pet. 12. There, the Second Circuit’s immunity-abrogation analysis focused on whether any “provision or feature of *the FSIA* *** bespeaks intent to abrogate that common-law scheme with respect to former officials.” 563 F.3d at 14 (emphasis added). The language Petitioners quote (Pet. 12) comes from another part of the *Matar* opinion considering whether defendant’s immunity, granted because “[t]he United States *** filed a Statement of Interest in the district court specifically recognizing [his] entitlement” to it, was “overridden by his alleged violations of the TVPA.” 563 F.3d at 14-15. The Second Circuit’s rejection of that *step-one* argument demonstrates how both *Matar* and the Ninth Circuit’s decision in *Doğan* are easily reconciled with the D.C. Circuit’s decision below: “the TVPA will apply to any individual official whom the Executive declines to immunize” at *Samantar* step one. *Id.* at 15.

II. THE DECISION BELOW DOES NOT CONFLICT WITH *SAMANTAR* OR THE EXECUTIVE BRANCH’S VIEW

Both the D.C. Circuit’s primary and its alternative holdings are consistent with this Court’s

Samantar decision and pose no conflict with the Executive Branch’s view.

A. This Court’s Immunity Precedents Do Not Render “Individual Capacity” Irrelevant

1. In *Samantar*, this Court declined to “resolve the dispute among the parties as to the precise scope of an official’s immunity at common law.” 560 U.S. at 321. That reservation itself belies Petitioners’ claim that the D.C. Circuit’s elaboration of that issue “conflicts” with *Samantar*. Indeed, this Court’s limited discussion of conduct-based immunity comports with the decision below.

As the Court explained, “the relationship between a state’s immunity and an official’s immunity is *** complicated,” insofar as conduct-based “immunity of individual officials is subject to a caveat not applicable to any of the other entities or persons” (*i.e.*, heads of state, heads of government, and foreign ministers) whose acts and liability are automatically attributed to the state. 560 U.S. at 321 & n.15. Conduct-based immunity is appropriate only “*if the effect of exercising jurisdiction would be to enforce a rule of law against the state.*” *Id.* at 321 (quoting Restatement § 66(f)). In its primary holding, the decision below recognizes the same “caveat.” Pet. App. 7a.

In fact, *Samantar* supports the D.C. Circuit’s specific decision to weigh whether a “[p]laintiff seeks to draw on the [foreign state’s] treasury or force the state to take specific action” in assessing whether “exercising jurisdiction in [a particular] case is

tantamount to enforcing a rule of law against the [state] itself.” Pet. App. 6a-7a. Petitioners contend that no court decisions (apart from the one below) “have distinguished between personal- and official-capacity suits.” Pet. 17. But *Samantar* itself pressed on that very distinction: “some actions against an official *in his official capacity* should be treated as actions against the foreign state itself, *as the state is the real party in interest*”; in such a case, “it is *not* a suit against the official personally, for the real party in interest is the [state].” 560 U.S. at 325 (emphases except last added).

In concluding that the state was not the real party in interest for purposes of determining whether the FSIA (as opposed to the common law) should control, this Court went so far as to note that the plaintiffs “sued petitioner in his personal capacity and s[ought] damages from his own pockets.” 560 U.S. at 325. It makes sense that those facts may also be relevant to determining whether the exercise of jurisdiction over a claim against a state’s foreign official is “tantamount to enforcing a rule of law against the [state] itself.” Pet. App. 6a.

This Court’s subsequent decision in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), demonstrates why. There, in the tribal-immunity context, the Court reasoned that “[t]he distinction between individual- and official-capacity suits is paramount” in determining whether an individual is entitled to its sovereign-employer’s immunity. *Id.* at 1291. “In an official capacity claim, [because] the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign

itself,” “[t]he real party in interest is the government entity, not the named official.” *Id.* “Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law.” *Id.* As such, “[o]fficers sued in their personal capacity come to court as individuals, and the real party in interest is the individual, not the sovereign.” *Id.* (citation omitted). The D.C. Circuit’s decision reflects application of those principles to the foreign-official conduct-based immunity context.

Petitioners warn that, “[s]o long as plaintiffs sue foreign officials in their personal capacities,” the decision below means “courts will have no substantive role in determining whether a foreign official is immune.” Pet. 14-15. But courts are routinely tasked with policing baseless attempts to plead around immunity. *Lewis* disposed of that precise concern: “In making th[e] assessment” about “whether the sovereign is the real party in interest” for purposes of immunity, “courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign.” 137 S. Ct. at 1290. *Samantar* similarly discounted the “risk that plaintiffs may use artful pleading” in order to better their chances of avoiding immunity. 560 U.S. at 325. There is no reason to take a different approach here.

2. Because *Samantar* never addressed whether Restatement § 66(f) applied in the first place, *see* pp. 25-26, *infra*, it “did not address [whether there is a] conflict between the [TVPA] and Restatement 66(f).”

Pet. App. 14a. There is thus no disagreement between *Samantar* and the D.C. Circuit’s alternative holding.

That much is made clear by this Court’s directive in *Samantar* that the court on remand assess “[w]hether [the foreign official] may be entitled to immunity under the common law”—*i.e.*, the same inquiry the D.C. Circuit faced here. 560 U.S. at 325-326. And like the D.C. Circuit did before issuing its alternative holding here, the Fourth Circuit on remand in *Samantar* examined the overlap between the foreign official’s claim of immunity and the elements of “the TVPA which authorize[] a civil cause of action.” 699 F.3d at 777. Finding “Congress’s enactment of the TVPA, and the policies it reflects, to be *** instructive,” the Fourth Circuit held that, because the TVPA incorporated *jus cogens* norms, a foreign official was not entitled to immunity from actions based on those *jus cogens* violations. *Id.* The conclusion below that the TVPA displaces Restatement § 66(f) no more “overruled” *Samantar*, Pet. 15, than did the Fourth Circuit’s decision finding no immunity on remand in that very case.

Petitioners nevertheless claim that, as a practical matter, “neither of *Samantar*’s steps survives the decision below,” because “it abrogates the Executive Branch’s ability to suggest common-law immunity.” Pet. 15. But for reasons explained above (pp. 18-19, *supra*), the D.C. Circuit’s alternative holding that the TVPA displaces Restatement § 66(f) (rather than abrogates foreign-official immunity wholesale) has no impact on the Executive Branch’s authority to issue a suggestion of immunity. Simply put, the decision below does not alter the process

articulated in *Samantar*: “if the Executive Branch issues a ‘suggestion of immunity’ the district court must ‘surrender[] its jurisdiction.’” Pet. 14 (alteration in original) (quoting *Samantar*, 560 U.S. at 311).

**B. The Executive Branch Declined To File
A Suggestion Of Immunity In This Case**

Petitioners’ argument (Pet. 13) that “[t]he decision below also conflicts with the views of the Executive Branch” does not withstand scrutiny. Despite emphasizing that “the Executive Branch has suggested immunity in numerous personal-capacity suits,” *id.*, the Petition fails to mention that the Executive Branch declined to issue a suggestion of immunity *in this case*. Even after “the DRC Ambassador to the United States sent [two] letter[s] to the United States Department of State denying Plaintiff’s allegations and requesting that the State Department submit a suggestion of immunity,” “the State Department did not accede to the plea *** , and never issued a request that the District Court surrender its jurisdiction.” Pet. App. 5a-6a. It is difficult to take seriously Petitioners’ charge that the decision below “undermine[s] U.S. foreign-policy interests,” Pet. 9, and “conflict[s]” with the “position of the Executive Branch,” *id.* at I, when the Executive Branch itself took no position on the U.S. foreign-policy interests in this case.

Petitioners also claim “the Executive Branch has consistently argued that the TVPA does *not* abrogate common-law conduct-based immunity.” Pet. 13. But as explained above (pp. 18-19, *supra*), the D.C. Circuit did not adopt a contrary position: nothing in the D.C. Circuit’s decision forecloses a court from dismissing a

TVPA suit in the event the Executive Branch issues a suggestion of immunity (notably absent here). The briefs of the United States that Petitioners highlight, which concern the effect of the TVPA on the first step of the *Samantar* procedure, make that clear. *See* Pet. 13-14. For example, in *Matar*, under the heading that Petitioners quote, the United States pressed an argument that mirrors the D.C. Circuit’s holding below: “[A] foreign official *will be subject to liability under the TVPA* in any case where the Executive informs the court that it has decided not to recognize the foreign official’s claim of immunity from suit.” U.S. Br. 28, *Matar v. Dichter*, No. 07-2579-cv, 2007 WL 6931924 (2d Cir. Dec. 19, 2007) (emphasis added). Accordingly, the decision below does not “conflict[]” with the views the Executive Branch has taken in other cases, let alone in this one.

III. THIS CASE IS A POOR AND PREMATURE VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED

A. Neither *Samantar* Nor The Decision Below Resolved The Predicate Question Whether The Restatement Defines The Relevant Common Law

As an initial matter, both questions presented hinge on application of Restatement § 66(f): for the first, the Restatement’s requirement that “the effect of exercising jurisdiction would be to enforce a rule of law against the state,” and for the second, the Restatement’s requirement that the challenged acts have been performed in an official capacity. But this Court went out of its way to “express no view on whether Restatement § 66 correctly sets out the scope

of the common-law immunity applicable to current or former foreign officials.” *Samantar*, 560 U.S. at 321 n.15. The D.C. Circuit took the same approach. Pet. App. 6a, 10a, 13a. Judge Randolph’s skepticism “that the Restatement *** embodies the governing common law,” *id.* at 11a (deeming the assumption “dubious”), makes that logically antecedent question difficult to ignore in this Court. Because the decision below rests on a premise that has never “been tested in an adversary proceeding,” the Court’s review would be premature at best. *Id.* at 11a-12a.¹

Petitioners hardly acknowledge the predicate question of the governing common-law test, other than to argue that the absence of any answer (or even litigation) gives this Court “maximum flexibility” to decide the questions presented “under whatever standard it deems fit, whether drawing upon the Restatement or not.” Pet. 31. But that is not how this Court operates. Because this Court is a “court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it would be imprudent to resolve the threshold question left open in *Samantar* without any adjudication in the lower courts.

¹ Further muddying the waters, Judge Randolph noted that “[t]he Restatement (Second) was superseded by the Restatement (Third) of Foreign Relations Law of the United States (1987),” and that “[t]here may be a plausible but oddly unexplained reason for invoking the older Restatement version and ignoring the newer.” Pet. App. 11a n.1. At the same time, courts of appeals have relied on the Restatement (Third) in analyzing foreign official immunity questions. *See, e.g., Yousuf*, 699 F.3d at 775. There is also now a Restatement (Fourth) of Foreign Relations Law (2018), published last year.

B. The Posture Of This Case Counsels Against Further Review

The D.C. Circuit provided two independent grounds for its judgment. Pet. App. 10a (“[T]he defendants *** do not qualify for immunity for either of two reasons[.]”). To vacate that judgment, this Court would need to grant review and reverse as to *both* questions presented—the latter of which was never “briefed nor argued” below, *id.* at 15a. That means the Court would be faced with resolving three thorny legal issues—two of which were not even litigated by the parties and none of which are the subject of a square split.

In addition, Petitioners have sought dismissal of this case on personal jurisdiction grounds. The court of appeals directed the district court to consider that argument on remand, and its resolution has not been stayed. A decision in Petitioners’ favor on that issue—which has been fully briefed below and is awaiting the district court’s decision—would moot this entire case. There is no reason for this Court to grant certiorari in an interlocutory case it ultimately may never have occasion to review.

C. Petitioners’ “Floodgates” And “Potential Emergency” Concerns Are Unfounded

Petitioners portray the decision below as inviting an “avalanche of cases” and creating a “potential emergency.” Pet. 25, 27. But that alarmist view is hard to reconcile with longstanding recognition that cases involving conduct-based foreign-official immunity are relatively scarce. *See* Pet. App. 7a

(describing the “the small number of decisions speaking to the existence and scope of common-law immunity”); *id.* at 14a (noting that U.S. case law on foreign official immunity is “sparse”); *id.* at 21a (“[T]he doctrine of common law foreign official immunity is not fully developed[.]”); *see also Samantar*, 560 U.S. at 312, 323 (explaining that “cases involving individual foreign officials as defendants were rare” and that foreign official immunity claims were “few and far between”). Petitioners’ own cases acknowledge as much. *See Smith v. Ghana Commercial Bank, Ltd.*, No. 10-cv-4655, 2012 WL 2930462, at *9 (D. Minn. June 18, 2012) (“Authority examining whether, and to what extent, foreign officials are entitled to immunity under the common law is sparse.”).

A sweeping change to the status quo is also farfetched because step one of the *Samantar* procedure—the suggestion of immunity—serves as a built-in backstop. Whether courts exercise jurisdiction that could “threaten the comity between the United States and foreign sovereigns” or “put senior U.S. officials at risk of liability in foreign courts,” Pet. 24, thus largely rests with the Executive Branch. The fact that the State Department usually “recommend[s] conduct-based sovereign immunity when *** the foreign state requests it,” *In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181, 188 (S.D.N.Y. 2015), undercuts the notion that TVPA plaintiffs will read the decision below as having removed the barrier of conduct-based immunity.

At the very least, the fact that the State Department declined to provide a suggestion of immunity in this case—despite two letters from the

DRC's Ambassador—is powerful evidence that, in the Executive Branch's considered opinion, allowing Lewis's suit to proceed is not contrary to the diplomatic or political interests of the United States. And in the unlikely event Petitioners' parade of horrors ever comes to pass, there would be ample opportunity for this Court to take up the questions presented—with the benefit of greater deliberation and adjudication of the issues among the courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Pratik A. Shah
Counsel of Record
Donald R. Pongrace
Z.W. Julius Chen
Merrill C. Godfrey
Lide E. Paterno
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Respondent

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